1993

Utah Department of Transportation v. Budd D. Lee, Jessie R. Lee, Allen Lee, Clayton Lee : Brief of Appellee

Utah Court of Appeals

NO. _____

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff/Appellant,	)	Case No. 930763-CA
v.	)	Priority 15
BUDD D. LEE and JESSIE R. LEE; ALLEN LEE; and CLAYTON LEE, Defendants/Appellees.	)	

BRIEF OF APPELLEES

APPEAL FROM THE FIFTH JUDICIAL DISTRICT
COURT, WASHINGTON COUNTY,
THE HONORABLE JAMES L. SHUMATE

DONALD S. COLEMAN (0695)
Assistant Attorney General
JAN GRAHAM (1231)
Attorney General
Attorneys for Plaintiff/Appellant
Utah Department of Transportation
120 State Office Building
Salt Lake City, Utah 84114
(801) 538-9500

JOSEPH HARLAN BURNS (0507)
965 South Main, Suite # 4
P. O. Box 6330
Cedar City, Utah 84720
(801) 586-8922

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120 State Office Building
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JURISDICTION

This Court has jurisdiction of this appeal pursuant to Utah Code Ann. § 78-2-2 (3) (j) (1992) and the transfer provisions of Utah Code Ann. § 78-2-2 (4) (1992).

STANDARD OF REVIEW

Appellant must marshall the evidence supporting the trial court's findings. **Cornish Town v. Koller,** 758 P.2d 919, 922 (Utah, 1988). This Court will review the evidence to determine whether the trial court's findings are supported by the evidence and will not disturb the trial court's refusal to grant a motion for immediate occupancy absent a clear abuse of discretion. **State v. Denver & Rio Grande Western Railroad Co.**, 332 P. 2d 926 (1958); **Salt Lake County v. Ramoselli**, 567 P. 2d 182 (Utah, 1977).

DETERMINATIVE STATUTES

Utah Code Ann. § 78-34-4 (1992)

Before property can be taken it must appear:

(1) that the use to which it is to be applied is a use authorized by law;

(2) that the taking is necessary to such use.

Utah Code Ann. § 78-34-9 (1992)

> The plaintiff may move the court...for an order permitting the plaintiff to occupy the premises sought to be condemned pending the action... The court or a judge thereof shall take proof... of the reasons for acquiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damage which may accrue to the parties.

SUMMARY OF ARGUMENT

I. There was substantial competent evidence to support the trial court's determination that there was not an adequate showing of necessity for an immediate taking of the appellees' property. UDOT had previously acquired property from the appellees for the purpose of realigning SR-9 and had done so. UDOT failed to make a showing that there was a public need to again realign the road and in the process take the appellees' home and business because there was only speculation that sometime in the future a slide may occur.

II. The Court did not err as to the burden of proof because it rendered its decision after receiving evidence and expert testimony presented by the owners which it was entitled to weigh against the evidence presented by UDOT.

ARGUMENT

POINT I

UDOT FAILED TO ESTABLISH THE NECESSITY FOR IMMEDIATE OCCUPANCY OF LEE'S PROPERTY

The Utah Department of Transportation ("UDOT") acquired a portion of Defendant/Appellees' ("Lees") property for the purpose of realigning SR 9. During the construction there occurred several "slides" from the area where UDOT was removing material from the hillside where it was relocating the road. UDOT removed the material which had moved and made several revisions in the slope of the disturbed area from that which it had originally engineered. (Tr., 6/28/93, pp. 19-24). UDOT completed the roadbed, put down an asphalt surface and opened the new section of highway to traffic in September, 1992.(Transcript, 6/28/93,p. 42). There was no evidence presented to show that there was any further problems with the embankment.(Tr, 6/28/93, p. 45). UDOT did not erect any signs warning the traveling public that it was a "slide area" or to "watch for falling rocks".(Tr., 6/28/93, pp. 47,48).

Salt Lake County v. Ramoselli, 567 P.2d 182 (Utah 1977) is instructive in the instant case. There the Court found that the county's intended use of the property it sought to condemn was "uncertain, indefinite, speculative, and not within the foreseeable future." Here the question is not as UDOT tries to define it, whether the highway project is uncertain, indefinite, speculative, or within the foreseeable future.(UDOT brief, p. 11). It is, rather, whether the **need** for the Lee property is such. UDOT has not suggested that the highway as it now exists after the realignment needs to be replaced because it is not an adequate,

modern highway. It merely speculates that if a slide should occur in the future it may be more costly to maintain than if it were to again realign the section of the highway across the property where the Lees have their homestead and business. UDOT offered no cost comparisons to show that the cost of condemnation and rebuilding would be less than the speculative costs of removal of material which may slide toward the highway.

UDOT presented no evidence that the highway as it now is used is dangerous. The fact that it erected no warning signs, commonly seen in the mountainous ares of the state, indicates that there is no present danger which would require it to warn the traveling public.

POINT II

THE DENIAL OF UDOT'S MOTION FOR IMMEDIATE OCCUPANCY WAS SUPPORTED BY AMPLE EVIDENCE

UDOT's assertion that the trial court mishandled the burden of proof is simply unfounded. The trial court did not summarily deny UDOT's motion; rather it heard extensive testimony presented by the Lees which included the expert testimony of Dr. Richard Kennedy, an eminent geologist, whose testimony was persuasive that there was no physical evidence to support UDOT's speculation that a slide may occur sometime in the future. He testified that after examining the site and particularly in consideration of the recent earthquake in the area and the unusually wet weather, that there was no reason to suggest that there would be any problem with the highway as it now exists.(Tr. 7/20/93, p. 23) He also testified that there were other areas which did show evidence of slide problems and pointed

out the difference in the geology of the subject property to support his opinion that there was nothing wrong with the section of highway in question.(Tr. 7/20/93, pp. 54-56).

The trial court has discretion to determine that UDOT did not sustain its burden of showing necessity. Having decided to refuse UDOT's motion, the trial court's discretion should not be disturbed on appeal. **Utah Copper Co. v. Montana-Bingham Consolidated Mining Co.**, 255 P. 672 (Utah, 1926); **State v. Denver & Rio grande Western Railroad Co.**, 332 P.2d 926 (Utah, 1958); **Salt Lake County v. Ramoselli**,567 P. 2d 182 (Utah, 1977).

While the power of eminent domain is considerable it is not without limit. The federal and Utah constitutions protect the right to possess and enjoy property. Those constitutional guaranties should not be brushed aside by a government agency which cannot adequately show a public need to take private property. Here, a family which has lived and done business in the same place for many years would be displaced with no place to relocate its business. A grave injustice would be done if UDOT was allowed to take the Lees' property in a summary fashion where there has been only a weak claim for a public need.

The Courts should always be available to protect the constitutional rights of its citizens, who otherwise would be subjected to the oppression of an overreaching government agency.

Each case must be viewed on the facts and merits of the case presented by those who would take another citizen's property. The trial court was acting within its sound discretion when it denied UDOT's motion for immediate occupancy.

CONCLUSION

The trial court's order denying UDOT's motion for immediate occupancy is supported by ample evidence and should not be disturbed on appeal.

DATED this 24 day of March, 1994.

Respectfully submitted,

JOSEPH HARLAN BURNS
Attorney for Defendants/Appellees

CERTIFICATE OF SERVICE

This is to certify that two copies of the foregoing Brief of Appellees were mailed first class, postage prepaid to Donald S. Coleman, Assistant Attorney General, attorney for UDOT, 4120 State Office Building, Salt Lake City, Utah 84114.

IN THE FIFTH JUDICIAL DISTRICT COURT IN AND FOR

WASHINGTON COUNTY, STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff, vs. BUDD D. LEE, JESSIE R. LEE, ALLEN LEE, and CLAYTON LEE, Defendant,	)	MEMORANDUM DECISION Case No. 930500474

The above-entitled matter came before the Court for hearing on the Plaintiff's motion for Order of Immediate Occupancy. The Court held two hearings on this matter, one on June 28, 1993, and the other on July 20, 1993. Judge James L. Shumate presided at both hearings, he having heard the initial proceeding in substitution for Judge J. Philip Eves who was out of the District on June 28, 1993. The Plaintiff was represented by Assistant Attorney General, Donald Coleman at both hearings. The Defendants appeared and were represented by their attorney, Joseph Harlan Burns, at both hearings. The Court visited the location of the property which is the subject of this litigation and viewed the subject property and walked over the landslide area north of Highway SR-9 and opposite the Defendant's property. The Court's visit to the property was on July 8,1993. The Court, with the stipulation of counsel, determined that the Motion for Order of Immediate Occupancy should be decided in two phases. The first phase is for the Court to determine the issues under Section 78-34-4, Utah Code Annotated, 1953, as

amended, to wit:

78-34-4. Conditions precedent to taking.

Before property can be taken it must appear:
(1) that the use to which it is to be applied is a use authorized by law;
(2) that the taking is necessary to such use;
(3) that construction and use of all property sought to be condemned will commence within a reasonable time as determined by the court, after the initiation of proceedings under this chapter; and
(4) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

The second phase is for the Court to determine (if the conditions precedent in the first phase have been met) the "value of the premises sought to be condemned, and of the damages which will accrue from the condemnation, . . ." 78-34-9, Utah Code Annotated, 1953, as amended.

Based upon the stipulation of the parties and in view of the reasonable scheduling of judicial time in this matter, this Memorandum Decision addresses only the issues of the necessity of the taking of the Defendant's property. With this objective in mind and after having heard the testimony, reviewed the exhibits, viewed the location and considering the arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Utah highway SR-9 runs east-west from the I-15 freeway, 16 miles north of the Utah-Arizona border through the towns of Hurricane, Virgin, Rockville, Springdale and thence into Zion National Park. This highway is the major access to Zion National Park from the west.

2. During the summer of 1992 the Plaintiff, Department of Transportation, was in the process of re-aligning and re-constructing SR-9 east of the town of Virgin in the area of the Defendant's subject property. Prior to 1992, SR-9 ran south of the Defendants' parcel. After the 1992 re-alignment the newly constructed roadway lay to the north of the Defendants' real-

geology department, estimated that there was approximately one-hundred twenty-five thousand cubic yards of material remaining on top of the slide plane. The Department of Transportation spent $584,000.00 to remove material that had already slumped during the construction of the new highway allignment.

9. On September 2, 1992, the southern portion of Washington County was shaken by an earthquake measuring a magnitude of 5.5 on the Richter Scale. The epicenter of that earthquake was 25 miles west and south of the landslide in question. The Court finds from the testimony of Dr. Kennedy, Mr. Budd Lee, and also through judicial notice under Rule 201 of the Utah Rules of Evidence, that there was no movement of this landslide during that substantial earthquake. The Court also finds that SR-9 was blocked by another landslide 10 miles east and further from the epicenter of the September 2, 1992, earthquake in the slide hill area of Springdale, Utah, just south of the boundary of Zion National Park. That earthquake placed boulders nearly eight feet in diameter on the surface of SR-9 just west of the subject landslide and also deposited smaller rocks, some two to three feet in diameter just east of the subject slide area. No debris was deposited on the road surface from the landslide that is the subject of this litigation during that earthquake.

10. The winter of 1992-93 was particularly wet in Washington County with high water and local flooding along the Santa Clara and Virgin Rivers. Near record amounts of precipitation were recorded along the entire watershed of the Virgin River including the area of this landslide. No substantial motion of the landslide was observed during this wet season or in the months since.

11. Neither the Plaintiff nor the Defendant presented any evidence of measurement to show the presence or lack of movement along the slide. This lack of evidence is notable since

estate, leaving the Defendants' property as an island of some 2.81 acres (see Exhibit No. 18) between the old and new highways. On the Defendants' property, to the east of the residence, there is a cultural site described in the documents supporting the affidavit of Susan G. Miller as a Virgin Anasazi habitation site. The Court finds that the cultural compliance requirements of the State of Utah and the Federal Government have been met and that the Paiute Tribe of Utah has filed notice with the Court of its intention to take no action with respect to this site.

3. Immediately to the north of the new highway the topography rises rapidly to a mesa which comprises the northern boundary of the Virgin River Valley in that location. The southern edge of that mesa slopes sharply downward to the south, reaching the valley floor in the area of the new highway. (see Exhibits 32 and 33)

4. The construction of the new alignment for SR-9 required the removal of a portion of the natural slope from the mesa in an area roughly paralleling the highway . As the natural material was removed from the foot of the slope a landslide developed. The top of the slide is clearly visible on the photographic exhibits where the loose material of the natural slope has moved downhill, toward the new highway, and exposed the columnar formations typically found at the edges of basalt layers.

5. The slide moved on three distinct dates. The first motion was observed by Plaintiff's engineer, Mr. Kenneth R. Burgess, on June 19, 1992. This slide was described as containing approximately one-third of the final amount of material which moved downhill. The slide next moved on July 22, 1992, when material in the center of the slide area, approximately one-hundred feet in width, travelled downhill. The final, and largest of the three movements was on August 3, 1992. After this slide Mr. Burgess estimated, and the Court so finds, that some six-hundred thousand cubic yards of material had moved between June 19 and August 3, 1992.

6. The new highway was under construction all through the period of these slides. As each motion took place, the engineering and geological experts from the Department of Transportation would review the circumstances and adjust the design of the slope along the slide. It was finally determined that the slope along the slide would be "laid back" at a ratio of 1.8 to 1, but that the highway itself should be re-aligned to the south of the new highway in order to avoid the slide area. The new alignment of the highway takes all of the 2.81 acres of the Defendants' property. (see Exhibit 16)

7. The Court finds that, even though the Plaintiff determined after the last slide of August 3, 1992, the highway should be re-aligned, the Department of Transportation continued in the construction of the new highway in its originally planned alignment. The final paving on the new highway was complete in the month of October 1992, and the highway, as shown in Exhibits 32 and 33, continues to appear as it did when it was completed. At no time has the Plaintiff placed any signs, flashers, flags or other warnings along the new highway to warn motorists of any danger from material falling onto the roadway from the slide. This lawsuit to condemn the Defendants' property was not filed until April 14, 1993.

8. This landslide moves along what is referred to by the experts as a slide plane. The slide plane is that surface, below the sliding material, which remains stationary while the body of the slide moves above and along the slide plane. The upper edge of the slide plane is clearly visible on the exhibits as the top of the lighter-colored cliffs, the columnar basalt formations. The lower edge of the slide plane is visible on the photographs and was viewed by this judge as being approximately ten to twelve feet above the grade of the road surface.

The slide plane itself is covered by the slumping material which lies on top of the plane between the upper and lower edges. The Defendants' expert, Dr. Kennedy of Southern Utah University's

modern surveying and engineering tools employing laser range finders should make such measurement relatively simple. The Court finds, from the judge's own observations and the photographic Exhibits 19, 21, 24, and 25, that the tracks left by the construction equipment on the face of the slide show no evidence of motion on the face of the slide.

12. The Court specifically finds that the Plaintiff is not acting in bad faith in seeking to take the Defendants' property. The Court finds, and the record clearly supports, that the Plaintiff's primary concern for this action is the safety of the public making use of SR-9 coupled with the preservation of public funds that might be expended in maintaining the road in its present location next to the landslide.

13. The proposed use of the Defendants' property for a re-alignment of SR-9 is a public use authorized by law.

14. The Court specifically finds, by a preponderance of the evidence, under the present circumstances and looking at the totality of the evidence before the Court, that there is insufficient evidence to support the claim of the Plaintiff that the landslide in question is currently moving or that it presents a present danger to the traveling public on SR-9.

From the foregoing Findings of Fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The issue before the Court has been narrowly framed by both the stipulation of the parties and the foregoing factual setting. The task of the Court is bounded by the language of Section 78-34-9 which states:

> The court or a judge thereof shall take proof by affidavit or otherwise of the value of the premises sought to be condemned and of the damages which will accrue from the condemnation, and of the reasons for requiring a speedy occupation, and shall grant or refuse the motion according to the equity of the case and the relative damages which may accrue to the parties.

The process of determining whether or not to "grant or refuse" the motion for immediate

occupancy is substantially complicated by the existing case law in this field. The Plaintiff has cited the Court to Utah Department of Transportation v. Fuller, 603 P.2d 814 (Utah, 1979). The Fuller case favorably quotes an earlier case, Postal Telegraph Cable Co. of Utah v. Oregon Short Line Railroad Co., 65 P. 735 (Utah, 1901) as follows:

> It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with. With the degree of necessity or the extent which the property will advance the public purpose, the courts have nothing to do. When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. [Citations omitted.]

The limitation on the scope of judicial review of the selection of sites taken under eminent domain powers is also described in 1 Nichols on Eminent Domain, [hereafter Nichols], § 4.11[3], at 4-184, 4-185:

> [The] legislature may, and usually does, delegate the power of selecting the land to be condemned to the public agent that is to do the work; in such case it makes little, if any, difference whether the grant of authority is, in terms, limited to such land as is 'necessary' for the purpose in view, for a general grant of authority carries the same limitation by implication and in either case the necessity is for the condemnor and not for the courts to decide, and the decision of such condemnor is final as long as it acts reasonably and in good faith.

The Department of Transportation urges this Court to follow the above-stated "general rule" and order the immediate occupancy of the Defendants' land because there is no evidence before the Court that would indicate that the Department is acting in bad faith or is guilty of oppression.

2. Counsel for the Defendants calls the Court's attention to the case of Salt Lake County v. Ramoselli, 567 P. 2d 182 (Utah, 1977) which tells the Court:

> The power of eminent domain is not to be exercised thoughtlessly or arbitrarily and the courts possess full authority to determine the proper limits of the power to prevent abuses in its exercise, and litigants should, and do have great latitude in conferring dispositive functions upon the court as they clearly did in this instance.
>
> The question of necessity of the taking is the functional prerogative of the judicial system and that principle of law is stated in Nichols on Eminent Domain as follows:
>
> ... 'In every case, therefore, there is a judicial question whether the taking is of such a

nature that it is or may be founded on public necessity. '...

In Ramoselli, supra., the parties had stipulated to a bifurcated proceeding in which the trial court first determined the necessity of the taking. Such a stipulation has occurred in this case as well.

3. In determining the necessity of the taking of the Defendants' property the Court relies on the definition of that term given in Williams v. Hyrum Gibbons & Sons Co., 602 P.2d 684 (Utah, 1979). In that case the Utah Supreme Court discussed the use of the term "necessity" as follows:

Where the legislature has conferred upon the court as in the case of 78-34-8(1), the duty of determining the necessity of a proposed taking, the necessity must be established by evidence or the proceeding fails. Necessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question; it merely requires the land be reasonably suitable and useful for the improvement.

The court in Montana Highway Commission v. Crossen-Nissen Co., 400 P. 2d 283 (Mont., 1965) interpreted a statute similar to 78 34-4, and necessity for the property taken did not mean that it must be indispensable to the proposed project. The word 'necessary' as used in the statute [93-9905, RCM 1947] connoted that the particular property taken was reasonably requisite and proper for the accomplishment of the purpose for which it was sought under the peculiar circumstances of each case.

Alaska has construed A.S.09.55.270(2), viz., 'the taking is necessary to the use,' similar to Montana in City of Fairbanks v. Metro Company. 540 P. 2d 1056 (Alaska, 1975) The court explained:

... once the condemnor has presented sufficient evidence to support a finding that a particular taking is 'reasonably requisite' for the effectuation of the authorized public purpose for which it is sought, particular questions as to the route, location, or amount of property to be taken are left to the sound discretion of the condemning authority absent a showing by clear and convincing evidence that such determinations are the product of fraud, caprice, or arbitrariness....

4. The Court does not adopt the position advocated by the Plaintiff that once a condemning authority shows a prima facie case of public necessity, the burden of proof shifts to the Defendant to show that the authority is acting in bad faith or that the authority is

oppressive in its desire to condemn. In determining if the taking of the Defendants' property in this case is "reasonably requisite and proper " for the needs of the travelling public Finding of Fact No. Fourteen above does not support the Plaintiff's position.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED , that the Plaintiff's Motion for Order of Immediate Occupancy is DENIED without prejudice. If the landslide begins to move again, the Plaintiff may apply for such an order again.

IT IS FURTHER ORDERED, under the facts of this case, that this is a final order, which, having disposed of the threshold question before the Court , is appealable under the provisions of Rule 54(b) of the Utah Rules of Civil Procedure.

Dated this 29th day of July, 1993.

STATE OF UTAH

JAMES L. SHUMATE
DISTRICT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing Memorandum Decision and by first class mail, postage pre-paid this 30th day of July, 1993, to the following:

Donald Coleman
Assistant Attorney General
4120 State Office Building
Salt Lake City, Utah 84114

Joseph Harlan Burns
P.O. Box 6330
Cedar City, Utah 84721-6330

C. Wright

Deputy Court Clerk